APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2414

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

v.

LINMARK ASSOCIATES, INC.,

Appellant

(Civil No. 80-0770 — D.N.J. — Camden)

Submitted Under Third Circuit Rule 12(6)
July 9, 1982

BEFORE: SEITZ, *Chief Judge*, SLOVITER, *Circuit Judge*, and McCUNE, *District Judge*.*

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*Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

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Chief Judge

ATTEST:

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Sally Mivos, Clerk

DATED: July 13, 1982

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2414

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

v.

LINMARK ASSOCIATES, INC.,

Appellant

(Civil No. 80-0770 — D.N.J. — Camden)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and McCUNE, *District Judge*.*

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*Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Chief Judge

DATED: August 5, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

Plaintiff,

v.

LINMARK ASSOCIATES, INC.,

Defendant.

Civil Action
No. 80-0770

OPINION

APPEARANCES:

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BROTMAN, District Judge

On March 24, 1981, subsequent to a jury trial in this matter, judgment was entered in favor of the plaintiff, Robert E. Lipschutz Associates, Inc., and against the defendant, Linmark Associates, Inc., for $112,509.05. Defendant Linmark now has moved this court, under Rule 50(b) Fed. R. Civ. P., to have the jury verdict and the judgment entered thereon on March 24, 1981 set aside and to have judgment entered in favor of defendant against plaintiff on the grounds that:

1. Deleted as not material to this petition.

2. Deleted as not material to this petition.

In the alternative, the defendant has moved, under Rule 59(a) Fed. R. Civ. P., for a new trial on all issues in the case on the grounds that:

1. The use of the term "kickback" by the trial court in a question to defendant's witness, Ehrenkrantz, concerning dealings with the principal of defendant was calculated to disparage defendant in the eyes of the jury and, thus, deprived defendant of a fair trial;

2. The conduct and comments of the trial court during the trial were one-sided in favor of plaintiff and prejudiced the jury against defendant and denied defendant a fair trial.

The two motions and their respective grounds shall be addressed seriatim.

II. MOTION FOR A NEW TRIAL

The defendant has moved this court, pursuant to Rule 59(a) Fed. R. Civ. P., for a new trial on all issues. The defendant has contended that a new trial is necessary because the defendant was deprived of a fair trial. In support of its claim the defendant has asserted two grounds: That the court's use of the term "kickback" in questioning Mr. Ehrenkrantz, a witness for the defendant, was calculated to disparage the defendant in the

eyes of the jury; and that the attitude, conduct and comments of the trial court during the trial were one-sided in favor of plaintiff and prejudiced the jury against the defendant. The defendant has pointed only to one specific incident and to the use of two questions at later points in the proceedings, without discussing the context, to support the second ground.

Upon our reviewing the record, the court finds that the defendant failed to take proper exception at trial to the court's use of the term "kickback"[2] or to any specific questioning which the court conducted during the one incident cited as ground two or to the court's interjection of the two questions ("Who owns the building" and "Who owns the land") set out in the defendant's brief. As a general rule, "[a]bsent proper exception or motion for mistrial, no error is preserved for review." *National Aviation Underwriters, Inc. v. Fischer*, 386 F.2d 582, 586 (8th Cir. 1967). *See also Manhattan Oil Co. v. Mosby*, 72 F.2d 840, 845 (8th Cir. 1934). Based on this principle, the court is not obligated to address defendant's claims and defendant's motion should be denied without addressing the merits of the claim.

In the alternative, even assuming the proper exceptions had been taken, the claims of the defendant do not support the granting of a new trial. In order to justify a new trial, the conduct complained of must be improper and must prejudice the movant in the minds of the jury to the extent that the jury is unable to exercise an impartial judgment upon the merits. *See, e.g., Cromling v. Pittsburgh and Lake Erie R.R. Co.*, 327 F.2d 142, 152 (3rd Cir. 1964); *Myers v. George*, 271 F.2d 168, 174 (8th Cir. 1959); *Stuckey v. Andrews*, 249 F.2d 828, 830 (5th Cir. 1957) *See generally* 6A Moore's Federal Practice, §59.08[2].

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[2]The court recognizes that the defendant did object when the plaintiff's attorney used the term "kickback" in a question to the same witness. However, this usage occurred after the court had used the term without objection on the defendant's part. The defendant has based his motion on the court's use of the term and not on whether the court's allowing the plaintiff to use the term was prejudicial error. In any event, the discussion below sufficiently addresses the use, in general, of the term in the specific context during the trial.

However, in those cases where the court's remarks may constitute error but the refusal to grant a new trial does not appear inconsistent with substantial justice, then the conduct is considered to be harmless error. A new trial thus would not be warranted. *See* Rule 61 Fed. R. Civ. P.; *Miley v. Delta Marine Drilling Co.*, 473 F.2d 856, 857-58 (5th Cir. 1973).

The court has reviewed the record in light of these principles and has concluded that the defendant received a fair and impartial trial. The court's conduct throughout the trial was not prejudicial and did not prevent the jury from reaching a just verdict. The court believes that its interjecting of questions throughout the trial was impartial, and helpful. "A federal trial judge is not a mere arbitrator who rules upon objections and instructs the jury." *Kornicki v. Calmar S.S. Corp.*, 460 F.2d 1134, 1137 (3rd Cir. 1972). "[I]t is not improper for the judge to seek to develop facts which he deems relevant to the issue before the jury. He may also discuss and comment on the evidence before the jury and is permitted to express his opinion on factual issues and credibility of witnesses so long as he finally makes it clear to the jury that it alone has the burden of decision." *Stuckey v. Andres, supra*, 249 F.2d at 830. The questions which the defendant refers to in its second ground, as well as other questions which the court asked throughout the trial, were aimed at enhancing the jury's proper understanding of the circumstances of the case. In addition, the court's instructions to the jury at the close of the trial clearly emphasized that the jury was the sole determinant of the weight and credibility of the evidence and that the jury was to make the final decision. Certain excerpts from the court's jury instructions illustrate this position:

> You are further instructed, that if I have asked any questions of any of the witnesses during the course of this trial . . . or if I have said or done anything during the trial, or in the course of instructing you now, whereby it seems to you that I am inclined to favor the case of the plaintiff or the case of the defendant, you must remove any such impression from your mind and not permit yourself to be influenced by any such impression, as none was intended to be created.

> Remember at all times, that you as jurors are at liberty to disregard all comments of the court in arriving at your own finding as to the facts . . . .

With particular respect to the term "kickback," the court concludes that it was appropriately used by the court in the specific context. The court was questioning Seymour Ehrenkrantz, who acted as the realtor for the defendant, Linmark, in acquiring the property on which the IHOP was to be built, about a commission sharing arrangement with Markowitz, the principal shareholder and officer of the corporate defendant. The initial questions concerning the sharing of the commission were raised by the defendant's attorney. The court then interjected its questions in an effort to clarify the relationship between Markowitz and Ehrenkrantz. After Ehrenkrantz admitted that the seller had paid him a commission and that he, Ehrenkrantz, had shared the commission with Markowitz, the principal shareholder and officer of the corporate defendant, the court asked if the payment was a kickback of a part of the purchase price. As the following definition of the term "kickback" indicates, this question was appropriate. "Kickback" has been defined as "a percentage payment exacted as a condition for granting assistance by one in a position to open up or control a source of income or gain." Webster's Third New International Dictionary (1971).

Even if the court's use of the term "kickback" was an error, when considered in the context of the specific colloquy and in the context of the rest of the trial, including the jury instructions referred to above, the usage did not affect substantial rights of the defendant and must be considered harmless under Rule 61, Fed. R. Civ. P. Thus, the court concludes that neither of the grounds asserted by the defendant supports the granting of a new trial.

STANLEY S. BROTMAN
United States District Judge

Dated: June 17, 1981